

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 BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN CONCLUDING THE SPECIAL REFEREE MADE A FACTUAL FINDING THAT THE DOG THAT BIT TRAVIS MILLIGAN WAS NOT A PIT BULL AND THAT GEOVERA IS BOUND THEREBY?

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STATEMENT OF THE CASE

Plaintiff, through her attorneys, Barry L. Baker and Amanda R. Maybank of the Charleston bar, filed this action on October 17, 2007 alleging, among other things, that a dog owned by Respondent/Third-Party Plaintiff (Tema Brown) attacked and bit her minor son, Travis Milligan. (R. pp. 35-36) (Complaint, ¶¶ 2, 8). An affidavit of service indicates that Tema Brown was served on November 19, 2007. (R. p. 389) (Affidavit of

Service). Tema Brown's homeowners' insurer, USF&G Specialty Insurance Company ("USF&G"), via the third-party administrator of the claim, Constitution State Services, had denied coverage by letter of September 28, 2006 to Tema Brown on the ground that she had advised that her dog was an American Pit Bull Terrier, a breed for which liability was specifically excluded. (R. pp. 399-403) (Sept. 28, 2006 letter to Tema Brown). By letter of the same date, USF&G so notified Mr. Baker. (R. p. 404) (Sept. 28, 2006 letter to Barry Baker). Tema Brown did not respond to the complaint and an order of default was filed on January 10, 2008. (R. pp. 3-4) (Order of Default).

Plaintiff's counsel, Amanda Maybank, filed a motion to refer the matter to a special referee on December 5, 2008. (R. pp. 140-141) (Motion for an Order of Reference). That motion was granted by order of March 11, 2009 of The Honorable Roger M. Young appointing Thomas J. Wills, IV as special referee. (R. p. 5) (Order of Reference to Special Referee). After a hearing, Mr. Wills entered an order of default judgment against Tema Brown in the amount of \$100,229, filed on September 11, 2009. (R. pp. 6-11) (Sept. 11, 2009 Order of Judgment).

On November 4, 2010, Tema 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” (R. pp. 411-412) (Assignment).

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.” (R. pp. 12-13) (Jan. 6, 2011 Order/Judge Dennis). It granted Tema Brown “leave to file a Third Party Complaint against her insurance company.” (R. pp. 12-13) (Id.). That order was consented to by Barry Baker “As Assignee for Tema Brown” and by Amanda R. Maybank as “Attorney for Plaintiff.” (R. pp. 12-13) (Id.) On July 14, 2011, another “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. (R. pp. 14-15) (July 14, 2011 Order/Judge Harrington). Amanda R. Maybank signed the “Consent Order” 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 Tema Brown. (R. pp. 14-15) (Id.).

On July 19, 2011, Tema Brown filed an “Answer and Third-Party Complaint” against Constitution State Services, Answer and Third-Party Complaint. On August 17,

2011, she filed a “Motion to Amend Third-Party Complaint” to add GeoVera (successor to USF&G) as a third-party defendant, to which GeoVera consented, which was granted by order of this court filed on December 9, 2011. (R. pp. 16-17) (Dec. 9, 2011 Order). The amended third-party complaint was filed on December 28, 2011. (R. pp. 58-119) (Amended Third-Party Complaint). Constitution State Services filed its answer on January 13, 2012, after which it filed an amended answer on February 13, 2012. (R. pp. 129-133) (Amended Answer of Constitution State to Amended Third-Party Complaint). GeoVera filed its answer on February 3, 2012. (R. pp. 120-128) (Answer of GeoVera to Amended Third-Party Complaint). On December 18, 2012, the master-in-equity entered a consent order dismissing Constitution State Services with prejudice. (R. pp. 18-21) (Dec. 18, 2012 Consent Order).

GeoVera filed a motion for summary judgment on May 12, 2014 and a memorandum in support on May 19, 2014. (R. pp. 142-304) (GeoVera’s Motion for Summary Judgment and Memorandum in Support with Exhibits).

Tema Brown filed a motion for summary judgment on May 15, 2014. (R. pp. 305-306) (Tema Brown’s Motion for Summary Judgment). The master-in-equity granted Tema Brown’s motion and denied GeoVera’s motion by order of March 11, 2015. He entered an order correcting the amount of the judgment on March 24, 2015. (R. pp. 22-31) (Mar. 24, 2015 Corrected Order).

GeoVera received notice of the entry of the order on March 19, 2015; received notice of the “corrected order” correcting the amount of the judgment on March 24, 2015; timely served its motion for reconsideration and to alter or amend judgment with regard to the original order on March 31, 2015; and timely served its motion for reconsideration and to alter or amend the corrected judgment on April 3, 2015. (R. pp. 307-324) (Motion for Reconsideration and to Alter or Amend Judgment (as to Corrected Order)).

GeoVera’s motion for reconsideration and to alter or amend judgment was denied by order of June 3, 2015. (R. pp. 32-34) (Order Denying Third-Party Defendant’s Motion for Reconsideration and to Alter or Amend Judgment). GeoVera received notice of the entry of the order denying its motion on June 10, 2015. GeoVera timely served and filed its Notice of Appeal on Monday, June 22, 2015.

STATEMENT OF FACTS

On April 20, 2005, a dog belonging to Tema Brown, escaped from her yard and attacked Plaintiff’s minor son, Travis Milligan. (R. p. 36) (Complaint ¶¶ 5 – 8). At the time of the incident, Tema Brown was the named insured of a homeowners insurance policy issued by USF&G. Policy. 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.

* * *

(R. p. 428) (USF&G Specialty Insurance Company policy number GH20051152, Master Endorsement, p. 1 of 2).

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.

(R. pp. 455-456) (MUSC record of April 20, 2005).

The South Carolina Department of Health and Environmental Control (“DHEC”)

Report includes the following:

Animal Information

* * *

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

(R. p. 457) (DHEC record of April 20, 2005):

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 [sic] old boy who sustained severe injuries when he was attacked by a pit bull dog on May 20, 2005 [sic].” (R. p. 458) (Peter C. de Vito, June 20, 2005 office note).

On April 29, 2005, Mr. Baker wrote Lavonne and Tema Brown advising them of his representation and asking that they turn his “letter over to the agent who handles your homeowner’s insurance” (R. p. 390) (April 29, 2005 letter of Barry Baker). Tema 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.

(R. pp. 325-326) (Transcript of May 10, 2005 Recorded Statement of Tema Brown).

On July 28, 2005, Mr. Hawkins sent a reservation of rights letter to Ms. Brown citing the exclusion quoted above, among other things. (R. pp. 391-398) (July 28, 2005 Reservation of Rights Letter). 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. (R. pp. 399-403) (Sept. 28, 2006 denial letter to Tema Brown). On the same day, she wrote Travis

Milligan's attorney, Barry Baker, to the same effect. (R. p. 404) (Sept. 28, 2006 denial letter to Barry Baker).

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. (R. pp. 35-38) (Complaint). An affidavit of service indicates that Ms. Brown was served on November 19, 2007. (R. p. 389) (Affidavit of Service on Tema Brown). 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. (R. pp. 459-463) (Affidavit of Brenda Trawick-Smith with Exhibits A and B). An order of default was filed on January 10, 2008. (R. pp. 3-4) (Order of Default). Another letter reiterating the denial was sent to Ms. Brown on or about April 7, 2008 by Terence Youngblood of Constitution State Services. (R. pp. 405-410) (April 7, 2008 letter reiterating denial).

On December 5, 2008, Ms. Maybank filed a motion to refer the matter to a special referee, which was granted by order of March 11, 2009 of The Honorable Roger M. Young appointing Thomas J. Wills, IV. (R. p. 5) (Order of Referral). 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.

(R. pp. 6-11) (Order of Judgment). The order includes a default judgment in the amount of \$100,229. (R. pp. 6-11) (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.” (R. p. 10) (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” (R. pp. 411-412) (November 4, 2010 Assignment).

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.” (R. pp. 12-13) (Jan. 6, 2011 Order/Judge Dennis). It specifically granted Ms. Brown “leave to file a Third Party Complaint against her insurance company.” (R. pp. 12-13) (Id.) That order was consented to by Barry Baker “As Assignee for Tema Brown” and by Amanda R. Maybank as “Attorney for Plaintiff.” (R. pp. 12-13) (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. (R. pp. 14-15) (July 14, 2011 Order/Judge Harrington). 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. (R. pp. 14-15) (Id.).

As set forth above, Tema Brown filed an “Answer and Third-Party Complaint” against Constitution State Services on July 19, 2011, which was later amended so as to effectively substitute GeoVera as third-party defendant, after which GeoVera and Tema Brown filed cross-motions for summary judgment.

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 referring to her dog as an American 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 letters |
| 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 before the Special Referee/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 |
| 05/19/14 | Hearing on Cross Motions for Summary Judgment (Transcript of Hearing on Cross Motions for Summary Judgment) |

03/11/15 Order Denying GeoVera's Motion for Summary Judgment and Granting Tema Brown's Motion for Summary Judgment

03/24/15 Corrected Order Denying GeoVera's Motion for Summary Judgment and Granting Tema Brown's Motion for Summary Judgment

04/03/15 GeoVera's Motion for Reconsideration and to Alter or Amend Judgment (as to Corrected Order)

05/13/15 Hearing on GeoVera's Motion for Reconsideration and to Alter or Amend Judgment (as to Corrected Order) (Transcript of Hearing on GeoVera's Motion for Reconsideration and to Alter or Amend Judgment (as to Corrected Order))

06/03/15 Order Denying GeoVera's Motion for Reconsideration and to Alter or Amend Judgment (as to Corrected Order)

ARGUMENT

In reviewing the grant of a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP. Grinnell Corp. v. Wood, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). Because undisputed facts leave only a question of law for the trial court, on appeal the appellate court reviews "whether the trial court properly applied the law to those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). When an action, such as a declaratory judgment action, presents a question of law, the appellate court's review is

plenary and without deference to the trial court. Crossmann Communities of N.C. Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011).

An order that is not directly appealable may be considered if there is an appealable issue before the court. Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005).

I. THE LOWER COURT ERRED IN CONCLUDING THE SPECIAL REFEREE MADE A FACTUAL FINDING THAT THE DOG THAT BIT TRAVIS MILLIGAN WAS NOT A PIT BULL AND THAT GEOVERA IS BOUND THEREBY.

The master-in-equity granted Tema Brown's motion for summary judgment and adjudicated the merits¹ of her claim, finding that the factual issue of her dog's breed had been actually litigated before the special master and that GeoVera, having declined to defend the suit, is bound by that determination. (R. p. 31) (March 24, 2015 Corrected Order p. 9). However, this finding is contrary to controlling South Carolina law and erroneous for the following reasons.

¹ The master-in-equity necessarily had to address the jurisdictional and procedural bars to the third-party complaint raised in GeoVera's motion for summary judgment in order to reach the merits of this claim. (R. pp. 24-28) (March 24, 2015 Corrected Order p. 2-6). Respondent's arguments regarding those issues are addressed below, in Sections II., III., and IV.

The special referee's order of judgment contains no finding that the dog in question was not a pit bull. Rather, in the "FACTS" section, the special referee 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." (R. p. 7) (Sept. 11, 2009 Order of Judgment, p. 2, 1st full ¶). 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." (R. p. 10) (*Id.*, p. 5, last sentence). In short, the special referee 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 find that the dog was not 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 the availability of insurance coverage.

The master-in-equity found persuasive cases from Georgia, California and Pennsylvania holding that "an insurer is bound by the underlying trial as to issues and facts actually litigated." (R. p. 30) (Mar. 24, 2015 Corrected Order, p. 8, 3rd ¶). However, the order does not cite controlling South Carolina authority for the proposition that South Carolina does not allow default judgments to have preclusive effect under the collateral estoppel doctrine because no issues were actually litigated. See Kunst v. Loree, 404 S.C. 649, 655-56, 746 S.E.2d 360, 363-64 (Ct. App. 2013), cert. denied (Aug. 21, 2014).

Thus, even if the special referee had found that the dog was not a pit bull, that holding is not binding in this action. Moreover, there was no “trial” of the original action, in that Ms. Brown was in default.

Finally, any such rule as that of those other jurisdictions referenced above 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). Sims is also controlling South Carolina authority that was not mentioned in the master’s order. 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. Id. at 84, 145 S.E.2d at 523. 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. Id. at 83-84, 145 S.E.2d at 523. Nationwide alleged that Mr. Sims’s actions were intentional, as a result of which liability coverage was not available to him under the policy. Id. at 84, 145 S.E.2d at 523.

Mr. Bates’s suit against Mr. Sims was tried without a jury and resulted in a verdict in favor of Bates. Id. at 84, 145 S.E.2d at 523-24. 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, 145 S.E.2d at 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. Id.

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. Id. 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.

Id. at 85, 145 S.E.2d at 524.

The court then quoted the following with approval from Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949):

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.'

Sims, 247 S.C. at 86, 145 S.E.2d at 525.

This issue was also addressed in Ranta v. 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. Id. at 374-75. Ranta thereafter reached a settlement with the Diocese and others, not including the priest. Id. at 375. 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. Id. Mr. Ranta then brought a declaratory judgment action against the insurer, Catholic Mutual, arguing that it was obligated to pay the judgment. Id. Catholic Mutual removed the case to federal court. Id. 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. Id. On appeal, Mr. Ranta

advanced an argument similar to that made by Tema Brown 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).

The master's order must be reversed 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, Tema Brown then testified to the contrary at the damages hearing. For the reasons set forth in Sims, GeoVera is not bound by such testimony, not only because the special referee made no such finding, but also given the overwhelming evidence to the contrary.

Neither Sims nor Ranta was addressed or even cited in the master-in-equity's order. Rather, the order relies on Williston on Contracts and foreign authority. Given the extensive evidence submitted that the dog was in fact at least fifty percent pit bull terrier, there is, at a minimum, a genuine issue of material fact on this issue and summary judgment in favor of Tema Brown was therefore inappropriate.

II. **THE LOWER COURT ERRED IN SUBSTITUTING PLAINTIFF AS THE REAL PARTY IN INTEREST MORE THAN THREE YEARS AFTER RESPONDENT, HAVING ALREADY ASSIGNED HER CLAIM TO PLAINTIFF, FILED A THIRD-PARTY COMPLAINT AGAINST GEOVERA.**

At the May 19, 2014 hearing² on the cross-motions for summary judgment, Tema Brown moved before the court to substitute the plaintiff as the real party in interest, with the substitution relating back to the initial filing, and the master-in-equity granted her motion. (R. p. 346, line 24 – p. 347, line 10; p. 25) (Transcript of May 19, 2014 hearing, p. 17, l. 24 – p. 18, l. 10; March 24, 2015 Corrected Order p. 3). This was an error because the substitution was allowed more than three years after Respondent filed a third-party complaint against GeoVera on a claim she had assigned to the plaintiff before filing the third-party complaint.

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.” (R. p 411) (Assignment, ¶ 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.” (R.

² The March 24, 2015 Corrected Order erroneously refers to the hearing being held on June 3, but the transcript of the hearing reflects the date of the hearing as May 19, 2014.

pp. 411-412) (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 section 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” (R. pp. 12-13) (Jan. 6, 2011 Order/Judge Dennis). Plaintiff’s counsel, Amanda Maybank and Barry Baker, consented to Judge Dennis’s order 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.”). (R. pp. 12-13) (Id.).

Having assigned her rights to the plaintiff, Tema Brown had no claims to assert against her insurance company. “[I]t 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) (quoting 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, Tema Brown, a second consent order was entered on July 14, 2011, authorizing Andrew K. Epting, Jr. to appear and file the third-

party complaint within thirty days, and referring the case to the master-in-equity thereafter. (R. pp. 14-15) (July 14, 2011 Order). 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.” (R. pp. 14-15) (Id.). Mr. Epting consented on behalf of Ms. Brown. Thus, not only does the assignment assign all of Tema Brown’s claims against GeoVera to the plaintiff, but the parties very clearly recognized that such an assignment had occurred. (R. pp. 14-15) (Id.) In fact, in response 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”, Tema Brown 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.” (R. p. 464) (Defendant/Third-Party Plaintiff’s Answers to GeoVera’s Discovery, Requests for Production 9).

“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). “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 6A 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.” 6A C.J.S. Assignments § 135. “This is important because generally only a real party in interest may pursue a cause of action.” Id.

Rule 17(a) of the *South Carolina Rules of Civil Procedure*, requires in part that, “Every action shall be prosecuted in the name of the real party in interest.” Because Tema 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 Am., 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, 138, 644 S.E.2d 699, 702 (2007). By virtue of the assignment, Tema 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 did 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, Tema Brown attempted 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.” (R. p. 465) (Defendant/Third-Party Plaintiff’s Answers to GeoVera’s Discovery, Interrogatory 9). 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 in an action against the insurer. Tema 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, 624, 731 S.E.2d 547, 549 (2012); see also

Moore v. Weinberg, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007). Since Tema 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. Standing is a fundamental requirement for instituting an action and no justiciable controversy is presented unless the plaintiff had standing to maintain the action. Brock v. Bennett, 313 S.C. 513, 519, 443 S.E.2d 409, 412-13 (Ct. App. 1994). “Once it is determined that a plaintiff has no standing to prosecute, the court must dismiss the action.” Id.

In another attempt to correct the problem, counsel for Tema Brown suggested at the May 19, 2014 hearing that plaintiff could be substituted as the real party in interest. (R. p. 346, line 24 – p. 347, line 10) (Transcript of May 19, 2014 hearing, p. 17, l. 24 – p. 18, l. 10). The master-in-equity’s March 24, 2015 order did in fact “substitute the assignee Plaintiff as the real party in interest.” (R. p. 25) (March 24, 2015 Order, p. 3, 1st full ¶). However, Rule 17, cited in footnote 1 of the order, contains a significant limitation on such substitutions, requiring that they be accomplished within “a reasonable time,” after objection, 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.**

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

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, 456 S.E.2d at 380 (emphasis added) (internal citation omitted).

This case, however, does not support Tema Brown’s position. First, regardless of whether it was Tema Brown or plaintiff who initially commenced the third-party

complaint, it was not timely, as set forth in III below. 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. Id. at 84, 456 S.E.2d at 378. 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. Id. at 85, 456 S.E.2d at 378. The South Carolina 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)." Id. at 87, 456 S.E.2d at 380.

In the case at bar, however, 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 made until the May 19, 2014 hearing – about two years and four months after GeoVera included in its answer that, "On information and belief, Third-Party Plaintiff is not the real party in interest . . . [and] lacks the capacity to assert the Third-Party Complaint, in that she assigned the right

to do so, if any, to Plaintiff.” (R. pp. 123-124) (GeoVera’s Answer to Amended Third-Party Complaint, Sixth and Ninth Defenses). The order allowing the substitution of plaintiff as the real party in interest was not entered until March 11, 2015. It is respectfully submitted that this is per se an unreasonable period of time, especially considering that Plaintiff and her counsel and Tema Brown were all aware of the assignment. 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.

III. THE LOWER COURT ERRED IN CONCLUDING THAT THE THIRD-PARTY COMPLAINT AGAINST GEOVERA WAS TIMELY, EVEN THOUGH IT WAS NOT FILED FOR MORE THAN FIVE YEARS AFTER RESPONDENT’S RECEIPT OF GEOVERA’S LETTER DENYING COVERAGE.

The master-in-equity held the statute of limitations had not expired on the third-party claim, as that claim was for indemnity and the statute did not begin to run until there was a judgment. (R. p. 28) (Mar. 24, 2015 Corrected Order p. 6). However, this was an error, as the start of the statute of limitations for the claim asserted in the third-party complaint was set by the letter denying coverage under Ms. Brown’s homeowner’s policy.

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. (R.

p. 460; pp. 399-403) (Affidavit of Brenda Traywick-Smith, ¶¶ 8 – 9; Sept. 28, 2006 letter to Tema Brown). 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. (R. p. 461; p. 463) (Affidavit of Brenda Traywick-Smith, ¶ 11; Jan. 7, 2008 letter to Tema Brown). Copies of prior correspondence “explaining why coverage was not afforded” were enclosed. (R. p. 461; p. 463) (*Id.*). On April 7, 2008, still another letter reiterating the denial and the reasons therefor was sent by certified mail, return receipt requested. (R. pp. 405-410) (April 7, 2008 letter). Significantly, counsel for the plaintiff-assignee, Amanda Maybank, was copied with that letter. (R. pp. 405-410) (*Id.*).³ 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

³ No affidavits or other evidence that any of these letters were not received were submitted. Therefore, there is a presumption of receipt. 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 Natl. 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).

than three years and three months after the April 7, 2008 letter reiterating the previous denials.

In her third-party complaint, Tema Brown sought a judicial declaration of “the rights and duties of the parties” and she prayed “for a declaration of coverage and entitlement” (R. p. 40) (Answer and Third-Party Complaint, ¶ 11 and prayer). A declaratory judgment action 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) (“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) (quoting 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 the April 7, 2008 letter reiterating the denial. 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 the assignment, it was Tema Brown who attempted to assert the claim. 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. (R. pp. 459-460) (Affidavit of Brenda Trawick-Smith, ¶¶ 4, 7). As set forth above, that policy was issued by USF&G, to which GeoVera is the successor. (R. pp. 18-19) (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.” (R. p. 136) (GeoVera’s Amended Answer to Amended Third-Party Complaint, ¶ 12). GeoVera’s amended 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), SCRC.P.

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.

(R. p. 138) (GeoVera's Amended Answer to Amended Third-Party Complaint).

The master-in-equity's 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. (R. pp. 27-28) (Mar. 24, 2015 Corrected Order, p. 5 – 6). However, as noted in his order, the third-party complaint is a declaratory judgment action. (R. p. 24) (Id., p. 2 at II). A cause of action for declaratory judgment accrues on the date that the insurer was initially called upon to defend the conduct of its insured with regard to another's claim and an actual controversy arose among the insurer and the insured, rather than from the moment of the accident or from the entry of judgment against the insured. See Gibraltar Ins. Co. v. Varkalis, 46 Ill.2d 481, 485-85, 263 N.E.2d 823, 826 (1970). See also Zourelis v. Erie Ins. Grp., 456 Pa. Super. 775, 778 n.2, 691 A.2d 963, 964 n.2 (1997) (noting that because a cause of action for declaratory judgment does not accrue until there is an "actual controversy," the statute of limitations began to run the day that the insurance company denied the insured's request for coverage); Western Cas. & Sur. Co. v. Evans, 130 Ariz. 333, 337, 636 P.2d 111, 115 (Ct. App. 1981) (finding that the statute of limitations for commencing a declaratory judgment action began to run when the insurer actually denied that coverage existed).

The denial letters unequivocally deny all coverage, including “any obligation to indemnify . . . ,” and 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, 390 S.C. at 169, 700 S.E.2d at 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.

A similar situation arose in Adamski v. Allstate Ins. Co., 738 A.2d 1033 (PA Super. 1999). In that case, Allstate denied coverage and declined to defend Miller in a suit brought against him arising out of an automobile accident. Id. at 1034. The ground as described in the April 2, 1986 denial letter was that Miller was not a permissive driver of the insured vehicle. Id. The jury returned a verdict against Miller for \$305,000 and judgment was entered on January 14, 1991. Id. On August 19, 1992, Miller verbally assigned his rights against Allstate to the plaintiffs in the suit, Mr. and Mr. Adamski. Id.

The Adamskis began a garnishment proceeding against Allstate, in which the court ruled that Miller was indeed a permissive user. Id. That ruling was ultimately

upheld on appeal, after which Allstate paid the Adamskis the \$50,000 policy limit, plus interest. Id. at 1034-35. The Adamskis filed a summons on November 9, 1993, but did not file their complaint until January 17, 1997, alleging that Allstate acted in bad faith by failing to defend, indemnify or otherwise protect Miller's interests. Id. at 1035. Allstate moved for summary judgment on the ground that the statute of limitations had run and for failure to state a cause of action. Id. at 1035. 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. Id. at 1035. 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. Id. 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. Id. at 1036. As in the case at bar, the question was when the cause of action arose. Id. 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, 604 (W.D. Pa. 2012) (stating 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”).

Tema 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, was received by Ms. Brown. See Bakala, supra; Weir, supra. Ms. Brown's answer and third-party complaint was not filed until July 19, 2011 – almost five years later.

The cases that the 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. Id. at 387. 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. Id. at 387-88. 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. Id. at 388. 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.

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, 115, 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 three months before GeoVera was added as third-party defendant. Moreover, counsel for the plaintiff-assignee (who has been substituted as the real party in interest) was copied with the April 7, 2008 letter reiterating the denial of coverage. Thus, not only was the assignor, Tema Brown, on notice in April 2008, at the latest, that coverage had been denied and that she could institute her declaratory judgment action, but the assignee -- the plaintiff herself -- was on notice because her attorney was sent a

letter on September 28, 2006 to that effect and another of her attorneys was copied with the April 7, 2008 denial letter. (R. p. 404; pp. 405-410) (Sept. 28, 2006 letter to Barry Baker; April 7, 2008 letter to Tema Brown). No affidavit denying receipt of either of those letters was ever submitted.

IV. THE LOWER COURT ERRED IN CONCLUDING THAT IT HAD JURISDICTION TO ADJUDICATE RESPONDENT'S THIRD-PARTY COMPLAINT, THIS ACTION HAVING BEEN FINALLY ADJUDICATED BY DEFAULT JUDGMENT ABOUT TWO YEARS BEFORE THE THIRD-PARTY COMPLAINT WAS FILED, SUCH THAT FURTHER ACTIVITY IN THE ACTION WAS IMPROPER.

The master-in-equity found that he had jurisdiction to hear and adjudicate the third-party complaint. (R. pp. 25-28) (Order p. 3-6). However, this finding was an error as explained below.

The special referee's order of judgment filed on September 11, 2009 awarding the plaintiff damages in the amount of \$100,229 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]." James F. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE p. 437 (2nd ed.). According to American Jurisprudence:

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 AM. JUR. 2D Judgments § 320.

In Arkansas Bankers Life Insurance Company v. Tomerlin, the Arkansas Supreme Court held that allowing a third-party complaint post-judgment was in error, requiring reversal. 340 Ark. 701, 13 S.W.3d 581 (2000). In Tomerlin, judgment was entered after a trial in July 1995. Id. at 702, 13 S.W.3d at 582. In September 1995, a motion for leave to file a third-party complaint was filed and granted. Id. The third-party defendant filed a motion to dismiss and strike the third-party complaint, arguing that the case had been finally adjudicated. Id. at 703, 13 S.W.3d at 582. The third-party defendant's motion was denied. Id. 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 707-05, 13 S.W.3d at 583 (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.); see also 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).

Tema Brown's third-party complaint was filed on July 19, 2011 – about a year and ten months after the complete and final adjudication of the action against her in the form of a default judgment on September 11, 2009. Her amended third-party complaint against GeoVera was filed more than two years and three months after the default judgment. This was after the statute of limitations had expired, and 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. They have attempted to avoid the statute of limitations by asserting the claim in a third-party complaint. However, because this action terminated upon entry of the default judgment, the circuit court was without jurisdiction to enter consent orders granting Tema Brown leave to file a third-party complaint, and the master-in-equity was also without jurisdiction to adjudicate her third-party complaint. (Even if it had jurisdiction, Tema Brown did not have standing to file a third-party complaint because she had already assigned it to plaintiff.) Moreover, both orders were entered as “consent orders.” Amanda Maybank signed as “Attorney for Plaintiff.” Barry Baker, who also represents plaintiff, signed “As Assignee for Tema Brown” and “for Tema Brown in her capacity as assignor of claims to Plaintiff,” respectively. Thus, while Tema Brown had assigned any rights she may have had to assert claims against GeoVera to the plaintiff and to cooperate with counsel for plaintiff, there is no evidence in the record that she authorized plaintiff’s counsel to execute consent orders on her behalf. However, because she had assigned her rights to plaintiff, her consent was irrelevant, since she had no standing to bring a third-party complaint anyway. That right belonged to the plaintiff,

who never asserted it, but who was substituted as the real party in interest in the corrected order of March 24, 2011, which, as discussed in section II above, was far too late.

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, 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. 291 S.C. 258, 260, 353 S.E.2d 154, 155 (1987). 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. Id. at 261, 353 S.E.2d at 156. 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. Id.

GeoVera, however, did preserve its defenses by presenting them in its amended 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), SCRCP; 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. (R. pp. 134-139) (GeoVera's Amended Answer to Amended Third-Party Complaint).

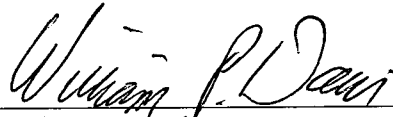
GeoVera has found no South Carolina case holding that a defendant's participation in the action waives such defenses. On the contrary, in Dunbar v. Vandermore, the South Carolina Court of Appeals reversed the circuit court's decision to deny a motion to dismiss for lack of personal jurisdiction because the defendant obtained an extension of time to move or file responsive pleadings. 295 S.C. 493, 369 S.E.2d 150 (Ct. App. 1988). 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.” Id. at 497, 369 S.E.2d at 152. 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) (finding that 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.).

CONCLUSION

For the foregoing reasons and upon the foregoing authorities, GeoVera submits that the order of the court below should be reversed and that judgment should be entered in its favor to the effect that the claims that have been asserted against GeoVera are barred.

RESPECTFULLY SUBMITTED,



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July 19, 2016

THE STATE OF SOUTH CAROLINA
In the 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

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JUL 20 2016
SC Court of Appeals

Jana Wright, as Guardian ad Litem for Travis M., a
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v.

Tema Brown. Respondent,

v.

GeoVera Specialty Insurance Co. Appellant.

CERTIFICATE OF COUNSEL

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



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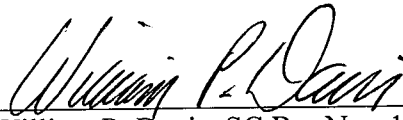
PROOF OF SERVICE

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 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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